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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 152

NEWTON W. LUMBRA, PETITIONER,

vs.

THE UNITED STATES OF AMERICA.

SUPPLEMENTAL BRIEF OF PETITIONER.

Statement.

At the time of argument of this case, the respondent presented to this Court, both orally and in its brief, a point which is not included within the questions to be reviewed under the writ, and which for that reason has not been prepared or discussed by the petitioner in his brief. As the briefs in this case were filed only a short time before the argument thereon, petitioner was unable to file a reply brief on the point and for that reason this Court granted leave to petitioner to present his views on the point involved.

Respondent's brief raises the question of law as to whether this Court has jurisdiction to review those parts of the judgment adverse to the respondent, in attempting to

overthrow the judgment of the circuit court of appeals below, although no writ of certiorari was granted except to the petitioner.

There was no cross-petition for certiorari, and this Court has previously consistently refused to review those parts of a circuit court of appeals opinion adverse to respondent in similar cases. The finding of fact of *totality*, which was concurred in by both courts below, will be accepted as conclusive by this Court and will not be reviewed here. For these reasons, we respectfully submit that the respondent is now precluded from questioning in this Court, as it attempts to do, the correctness of the decision of the circuit court of appeals that the insured petitioner was *totally* disabled.

It is clear from respondent's brief and from oral argument that respondent is questioning the decision of the circuit court of appeals in its finding in favor of petitioner upon the question of "total disability." On pages 9 and 10 of respondent's brief it is stated:

> "We respectfully submit that substantial evidence is lacking in this case to establish either of the two conditions which are essential to the recovery of disability benefits under a war-risk insurance contract, namely (1) an impairment of mind or body which renders it impossible for the insured to follow continuously any substantially gainful occupation and (2) a reasonable certainty that the total disability will continue throughout the lifetime of the insured (see Treasury Decision No. 20, *supra*)."

Practically all decided war-risk insurance cases mentioned in respondent's brief relate to the question of *total* disability.

The question before the district court was whether or not Newton W. Lumbra was *totally* and *permanently* disabled within the meaning of his War-Risk Insurance contract

(R. 2-5). Motion was made on behalf of the United States for a directed verdict upon the alleged insufficiency of the evidence to establish *total* and *permanent* disability, which motion was overruled, exception taken (R. 247-248), and a jury verdict in favor of petitioner resulted (R. 11-12). An appeal was taken by the United States to the Circuit Court of Appeals for the Second Circuit, urging as error, among other things, the denial of its motion for a directed verdict (R. 303-305).

The question involved in the circuit court of appeals was whether or not there was sufficient evidence of the insured's *permanent* and *total* disability at or prior to the time his policy lapsed requiring the trial court to submit the case to the jury.

The Circuit Court of Appeals for the Second Circuit found that—

> "while a jury might properly find that while the term insurance contract in question was in force the insured *could not engage continuously in any gainful occupation*"

and was therefore suffering from total disability[1]

> "yet the question of the permanency of the insured's total disability was not established by reason of the fact that no *expert testimony of such permanence was produced and the petitioner failed to establish his claim because of a lack of such expert testimony*". (R. —).

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[1] Treasury Decision 20, W. R., and Regulation No. 11, effective March 9, 1918, which has never been repealed, defines "total disability" as follows:

"Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed, * * * to be total disability."

It will thus be seen that the circuit court of appeals in this case held that there was sufficient evidence of *total disability* to go to the jury and in that respect upheld the decision of the trial court and the verdict of the jury. Therefore the circuit court of appeals ruled adversely to respondent solely upon the question of *permanency*.

Brief of Argument.

I.

This Court does not have jurisdiction in the exercise of its discretion to review those parts of the judgment of the circuit court of appeals adverse to respondent because no writ of certiorari was granted to the respondent or even requested by respondent.

II.

Even should this Court have jurisdiction in the exercise of its discretion to review those parts of the opinion of the circuit court of appeals adverse to respondent, yet to do so would be contrary to the previous rulings of this Court upon the subject.

III.

A finding of fact concurred in by both courts below will be accepted as conclusive by this Court and will not be reviewed here.

ARGUMENT.

I.

This Court does not have jurisdiction in the exercise of its discretion to review those parts of the judgment of the circuit court of appeals adverse to respondent because no writ of certiorari was granted to the respondent or even requested by respondent.

The question which respondent has argued in its brief in respect to the question of *totality* is not presented in the

petition for certiorari. The only specifications of error which were presented to this Court were as follows:

1. The circuit court of appeals erred in holding that the *permanence* of a total disability at date of lapsation of policy for non payment of premium was a fact requiring expert evidence.

2. The circuit court of appeals erred in holding that because no expert evidence was produced of the *permanency* of petitioner's total disability at date of lapsation of policy for non payment of premium, the petitioner failed to establish his claim.

The respondents did not file a petition for certiorari, and for this reason we respectfully urge that this Court is without the jurisdiction to review that part of the judgment below relative to the question of totality.

Practically all of the cases mentioned in respondent's brief pertaining to war risk insurance cases relate to the question of *total* disability.

The argument of respondent relative to the lack of petitioner's *total* disability constitutes an attack upon the decision of the circuit court of appeals holding that *total disability* was established in this case.

The respondent is not seeking to support the judgment on a ground rejected by the court below; it is seeking to have the judgment reversed.

This Court has decided that a respondent or appellee, who has taken no steps to have a judgment against him reviewed, may not *attack* that judgment in this Court. In *United States* v. *American Railway Express Co.*, 265 U. S. 425, 435, this Court said:

> "It is true that a party who does not appeal from a final decree of the trial court can not be heard in opposition thereto, when the case is brought here by

> the appeal of the adverse party. In other words, the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below."

This decision has not been overruled, and the cases upon which the respondent relies do not conflict with it.

In *Langnes v. Green*, 282 U. S. 531, this Court decided that a respondent in certiorari might advance in this Court, in *support of the judgment*, a ground which had been rejected by the court below. In reaching this result it cited and quoted with apparent approval from the opinion in *United States v. American Railway Express Co.*, 265 U. S. 425. See also *Stone Purchment Co. v. Paterson Co.*, 289 U. S. 555, 560. This Court was not called upon in any of these cases cited to decide whether a respondent may attack the judgment below although he has filed no cross petition for certiorari. Any language in the opinion in the *Langnes* case which might seem to relate to this question must be taken in the light of the fact that the *Langnes* case arose in admiralty, and, as this Court recognized in its opinion, an appeal in admiralty is a trial *de novo*.

The present case is an action at law. Under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, the writ of certiorari which this Court has granted on the petition of the petitioner brings the case before this Court "for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal." Under this statute it is plain that this Court's jurisdiction is the same as it would have been if the case had been brought here by the petitioner by writ of error or appeal. This Court has frequently decided that an appel-

lee or a defendant in error may not attack the decree or judgment below, and we submit that these decisions, under the statute quoted above, are controlling here.

In *Ritchie* v. *Brown*, 211 U. S. 321, the point was directly decided by this Court. Counsel for the appellees was permitted to file a brief and to argue against the decree below, "this court stating, however, that it would thereafter decide whether counsel for executors (appellees) had any right to be heard to contend against the decree of the court below" (P. 328). The question was thus squarely presented for decision, and this Court disposed of it as follows (P. 329):

> "We are of opinion that counsel for the executors had no right to appear and be heard against the decree, no appeal having been taken from it by his clients."

A similar result was reached in *Peoria Ry. Co.* v. *United States*, 263 U. S. 528, where this Court said (P. 536):

> "But by failure to enter a cross appeal from the court's action in overruling its objection, the right to insist upon it here was lost. The appellees can be heard before this Court only in support of the decree which was rendered."

Another decision to the same effect is *Terminal R. R. Assn.* v. *United States*, 266 U. S. 17, 28 29. See also *The Maria Martin*, 12 Wall. 31, 40; *The Stephen Morgan*, 94 U. S. 599; *Mount Pleasant* v. *Beckwith*, 100 U. S. 514, 527; *Bolles* v. *Outing Co.*, 175 U. S. 262, 268; *United States* v. *American Railway Express Co.*, 265 U. S. 425, 435, *supra*.

As all of these cases were decided prior to the enactment of the Act of February 13, 1925, the statute, under familiar principles, must be taken to adopt and incorporate the rule which they establish.

This question was urged by the United States, then petitioner in the case of *U. S.* v. *Henry Prentiss & Co.*, 288 U. S. 73, where this Court in a decision rendered January 9, 1933, at page 88 stated:

> "The argument is that this court has jurisdiction in the exercise of its discretion to review those parts of the judgment adverse to the respondent, though no writ of certiorari was granted except to the petitioner, the government, nor was any other even asked for. We are not required at this time either to affirm or to deny the existence of the power that the argument imputes to us. If the power exists, the respondent has not persuaded us that our discretion should be moved to use it."

Petitioner's contention that the point presented by respondent is in effect an attack on part of the judgment of the circuit court of appeals, is emphasized by a review of the cases cited in respondent's brief, the majority of these cases having presented the question of *totality*.

For these reasons we submit that this Court is without jurisdiction to review the judgment below at the behest of the respondent, so far as the respondent seeks to have that judgment reversed.

II.

Even should this Court have jurisdiction in the exercise of its discretion to review those parts of the opinion of the circuit court of appeals adverse to respondent, yet to do so would be contrary to the previous rulings of this Court upon the subject.

In *Hubbard, Assignee*, v. *Tod*, 171 U. S. 474, this Court said:

> "This case belongs to the class of cases in which the decree of the circuit court of appeals is made final by

the statute, and having been brought up by certiorari on the application of petitioner below, is pending before us as if on his appeal."

"And as respondent did not apply for certiorari, we shall confine our consideration of the case to the examination of errors assigned by petitioner."

In *Alice State Bank et al.* v. *Houston Pasture Co.*, 247 U. S. 240, Justice Holmes said:

"* * * But as that is not the ground upon which the writ of certiorari was asked or granted, we confine our discussion to the matter relied upon in asking the intervention of this Court."

In *Webster Electric Co.* v. *Splitdorf Electrical Co.*, 264 U. S. 463, a case concerning three patent claims in the court below, only one of which, however, was questioned in the writ of certiorari, this Court said:

"But the petition upon which writ was granted, challenged the decision below only in respect to third patent; and we are not called upon to consider the contentions now advanced as to the others."

and then cited the case of *Alice State Bank et al.* v. *Houston Pasture Co.*, *supra*, to support its position.

In *Federal Trade Commission* v. *Pacific Paper Association*, 273 U. S. 52, this Court held:

"Respondents, notwithstanding their failure to petition for certiorari, now ask for a reversal of that part of the decree which leaves in force part of paragraph (*e*) and paragraphs (*g*) and (*h*). This Court has the same power and authority as if the case had been carried here by appeal on writ of error. A party who has not sought review by appeal on writ of error, will not be heard in an appellate court as to the correctness of the decree of the lower court. This is so well settled that citation is not neccessary. The respond-

ents are not entitled as of right to have that part of decree reviewed."

In *Steele, Executor*, v. *Drummond*, 275 U. S. 199, at page 203, this Court stated:

> "Respondent sued in District Court for Northern District of Georgia to recover damages for breach of contract. A general demurrer was interposed and sustained. The circuit court of appeals held that one count started a cause of action and reversed the judgment. The petition for certiorari was based on the contention that the contract in suit was contrary to public policy and void. *No other will be considered.*" (Italics ours.)

We submit that even should the Court have jurisdiction to review the decision of the circuit court of appeals in this case as to the question of *totality*, nevertheless, according to the finding of fact of the petitioner's *totality* by the district court and jury and by the circuit court of appeals, this Court will not review such finding:

John H. Page v. *Arkansas Natl. Gas Corp.*, 286 U. S. 269, 52 S. Ct. 507, 76 L. Ed. 1096.

United States of America v. *Commercial Credit Co.*, 286 U. S. 63, 76 L. Ed. 978.

Texas & N. O. R. Co. v. *Brotherhood of R. & S. S. Clerks*, 281 U. S. 548, 50 S. Ct. 427, 74 L. Ed. 1034.

III.

A finding of fact concurred in by both courts below will be accepted as conclusive by this Court and will not be reviewed here.

This Court has recently held in two different cases where a review by the Supreme Court of the United States of a judgment of a circuit court of appeals is sought because of

a conflict of opinions on one of the questions therein involved between such circuit court of appeals and the circuit court of appeals of another circuit, this Court will consider such question *only*.

In the instant case the petition for certiorari asked for the writ because of the conflict of opinion in several circuits as to the test of the *permanency* of a total disability. That is the only question raised by petitioner's application for a writ and assignment of error. It was the only matter which this Court could possibly consider at the time petitioner's application for certiorari was granted. Therefore the error complained of by *petitioner* is the only error now properly before this Court for consideration.

As stated in *Enstein* v. *Ascher & Co., Inc.*, 282 U. S. 445:

> "The petition here for certiorari asked for the writ because of the conflict of opinion in the two circuits. The contested below and differently ruled in the Circuit Court of Appeals, concerns the effect of the delay in disclaiming. According to the usual practice we will consider nothing else" (Justice McReynolds).

This Court in other recent decisions has stated where no application for certiorari is made by the respondent, its consideration is limited to errors assigned by the petitioner.

Even though in an admiralty suit, an appeal is in the nature of a trial *de novo*, this Court held in that type of case, in *Oxford Paper Company* v. *Steamship Nidarholm*, 282 U. S. 681; 51 S. Ct. 266; 75 L. Ed. 614, which was a case where the respondent sought to raise the question of liability different from that sought by the petitioner in his application for writ. This Court refused to consider that respondent's claim, and held:

> "As respondent did not ask certiorari, the only question we shall consider is whether or not the Court was

wrong in denying the asserted liability of the ship for the entire loss."

In the instant case regarding *totality* the trial court, in denying defendant's motion for directed verdict, found sufficient evidence to submit that question to the jury. In the circuit court of appeals, the respondent urged as error the action of the trial court in submitting that question as well as the question of "permanency" to the jury. However, the circuit court of appeals, in a specific finding, affirmed the action of the lower court so far as "total disability" was concerned, stating that there was sufficient evidence of *total* disability in the following language:

> "There was evidence from which a jury might find that, when the plaintiff ceased to pay premiums in May, 1919, he was *totally* disabled, but none from which they might find that his disability was '*permanent*'." (Italics ours.)

Therefore, there has been a finding of fact by two lower courts, supported by the jury's finding, of *total* disability in the instant case.

In recent cases in which this Court has passed on this question, the following language was used:

> "Many and complicated questions of fact are involved and were argued here, but as they have been found in favor of the respondent by both courts below we do not review them."
>
> *John H. Page* v. *Arkansas Natl. Gas. Corp.*, 286 U. S. 269, 52 S. Ct. 507, 76 L. Ed. 1096.
>
> *United States of America* v. *Commercial Credit Co.*, 286 U. S. 63, 76 L. Ed. 978.
>
> *Texas & N. O. R. Co.* v. *Brotherhood of R. & S. S. Clerks*, 281 U. S. 548, 50 S. Ct. 427, 74 L. Ed. 1034.

The rule sometimes appears to be different in admiralty cases and is set forth in *Langnes* v. *Green*, 286 U. S. 531, 75 L. Ed. 520.

Though it is recognized even in admiralty cases that it is merely a matter of right which the Supreme Court may indulge in but as a matter of practice the Supreme Court will not, as a rule, review facts found and concurred in by both lower courts. The admiralty rule seems to be based upon the fact that an appeal by either party brings the cause *de novo* before the circuit court of appeals and any finding of fact made by that court may be reviewed by the Supreme Court if it sees fit so to do. Where the case is one at law, however, it seems to be clearly established as heretofore indicated. There are even many cases in admiralty, however, in which the Supreme Court has refused to review the fact where concurred in by both lower courts and has stated that no such review will be made unless the finding in the lower courts was clearly in error.

Piedmont & G. C. Coal Co. v. *Seaboard Fisheries Co.*, 254 U. S. 1, 41 S. Ct. Rep. 1, 65 L. Ed. 97.

Walsh v. *Rogers*, 13 How. 283, 14 L. Ed. 147.

Oelwerke Teutonia v. *Erlanger & Galinger*, 248 U. S. 521, 39 S. Ct. Rep. 180, 63 L. Ed. 399.

A verdict approved by two lower courts will be accepted by this Court as a conclusive finding upon the question of fact involved.

Chicago & E. I. R. Co. v. *Collins Produce Co.*, 249 U. S. 186, at page 192, 39 S. Ct. Rep. 189, 63 L. Ed. 552.

Second Russian Insurance Co. v. *Miller*, 268 U. S. 552, 45 S. Ct. Rep. 593, 69 L. Ed. 1088.

Darlington v. *Turner*, 202 U. S. 195, 26 S. Ct. Rep. 630, 50 L. Ed. 992.

Capital Trans. Co. v. *Cambria Steel Co.*, 249 U. S. 334.

It is, therefore, contended that the law has been clearly established by this Court that where certiorari is allowed, this Court will deal *only* with the error alleged by petitioner, and will not consider error as advanced by the respondent where respondent has not excepted to the finding below and petitioned for a writ of certiorari. It is further firmly established as law by this Court that where the two lower courts have concurred in a finding of fact, this Court will not review those facts; and though a review is sometimes made in admiralty, it is because of the situation peculiar to an admiralty appeal, and is not applicable in a case at law such as the present one. In view of the foregoing, we submit that this Court in the instant case should therefore consider the fact of totality as correctly found and not inquire into that further and should confine its review to the error relating to the requirement of medical evidence in order to establish the *permanency* of the disability, as set forth in petitioner's assignments of error contained in the petition for certiorari.

Conclusion.

For the foregoing reasons it is respectfully submitted that the respondent is now precluded from questioning in this Court the correctness of the decision of the circuit court of appeals that the insured petitioner was *totally* disabled.

Respectfully submitted,

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